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U. S. SUPREME COURT

No. 792 15

In the Supreme Court of the United States

OCTOBER TERM, 1944

HARRY E. WHITE, PETITIONER

v.

WM. F. STEER, COLONEL, INFANTRY, UNITED STATES
ARMY, PROVOST MARSHAL, CENTRAL PACIFIC AREA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 57) is not reported. The opinions rendered in the Circuit Court of Appeals (R. 706) are not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 1, 1944 (R. 751). The peti-

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tion for a writ of certiorari was filed on December 29, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the imprisonment of the petitioner, a civilian, pursuant to a conviction in a military provost court for embezzlement, in violation of the laws of the Territory of Hawaii, is valid under martial law proclaimed by the Governor of Hawaii and approved by the President under the Hawaiian Organic Act (48 U. S. C. 532).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are printed in the Appendix to the Government's Memorandum in *Duncan v. Kahana-moku*, No. 791, pp. 25-26.

DISCUSSION

This is a companion case to *Duncan v. Kahana-moku*, No. 791, this Term, in which the Government has filed a memorandum setting forth in detail the background of martial law in Hawaii. Both cases were argued together and decided in a single opinion by the court below. In this case the petitioner, a civilian engaged in the business of stockbroker and investment agent, was convicted on August 25, 1942, in the Provost Court at Honolulu, Territory of Hawaii, for the offense

of embezzlement, in violation of Section 5840 of the Revised Laws of Hawaii (R. 16). He was arrested on August 20, 1942, and advised of the charge against him (R. 5, 25). On August 22, petitioner was brought before the provost court (R. 5-6, 25). His attorney filed a written reply denying the jurisdiction of the Provost Court and demanding a jury trial for the petitioner (R. 10-11). Petitioner also made a motion for continuance of the trial, on the ground that he had not had sufficient time to prepare his defense or to advise with counsel, and on the further ground that the counsel of his choice was visiting a doctor daily on account of an injury to his arm (R. 11-15). The motion for a continuance was denied, and on August 25, 1942, petitioner was tried and convicted of the offense of embezzlement, and was sentenced to imprisonment for five years (R. 15-17, 61). The term was later reduced to four years (R. 61, 482).

On April 14, 1944, a petition for a writ of habeas corpus was filed in the District Court (R. 2), alleging that the petitioner's trial in the provost court was in violation of his statutory and constitutional rights, that the trial was unfair, and that there was no military necessity for trial by a military tribunal (R. 4-9). The respondent's answer to the petition, filed April 18, denied that the trial was unfair, and alleged that military necessity required the trial of civilians,

including the petitioner, by the provost court and that such courts were established by the Commanding General acting as Military Governor in good faith and in the honest belief that military necessity required them (R. 25-33). In his traverse, filed April-18, 1944, the petitioner denied the jurisdiction of the Provost Court to try him for the offense of embezzlement (R. 37-42). On April 18 the writ issued, the petitioner was produced in response to the writ, and was released on bail of \$500.00 (R. 98-100).

On the hearing in this habeas corpus proceeding on April 20, 1944, shortly after termination of the hearing on April 11 in the *Duncan* case, testimony and exhibits in the *Duncan* case were placed in evidence in this case by stipulation (R. 43-57, 100-111). It was stipulated that Admiral Nimitz and General Richardson, if called as witnesses, would testify that their testimony in the *Duncan* case was in their opinion equally applicable with respect to the period from August 20 to 25, 1942, and to the offense here involved (R. 56).

The District Court held that, assuming that martial law was valid, there was no military necessity for the petitioner's trial for the offense of embezzlement in a military court in August 1942, and that the petitioner was therefore being unlawfully imprisoned (R. 67-73). The court below unanimously held that at the time the peti-

tioner was tried complete martial law was in effect, and that the petitioner was lawfully tried by the provost court (R. 720).

The question whether the petitioner was given a fair trial in the provost court (Pet. 4, 10-12) is not presented by the record. The allegation in the petition for a writ of habeas corpus that the provost court trial was unfair (R. 7) was denied in the return (R. 26). At the hearing in the District Court the petitioner introduced no evidence on this issue. The District Court did not rule on this question, although it stated in its decision that this was one of the petitioner's contentions (R. 65). The court below stated that there was nothing in the showing made in the case which would warrant release on habeas corpus on grounds relating to the fairness of the trial in the provost court (R. 727, 749). In these circumstances no question of the fairness of the trial in the provost court would seem to be presented here.

On the question whether the provost court had jurisdiction to try the petitioner for embezzlement, the general considerations set forth in the Government's Memorandum in the *Duncan* case would appear to be applicable here. It may be noted, however, that the offense here involved is not as directly connected with military security as

the offense in the *Duncan* case. The petitioner in this case was tried in the provost court on August 25, 1942, less than nine months after the Japanese attack on Pearl Harbor.

Respectfully submitted.

CHARLES FAHY,

Solicitor General.

HERBERT WECHSLER,

Assistant Attorney General.

EDWARD J. ENNIS,

Special Assistant to the Attorney General.

JANUARY 1945.